



THE FOIA IMPROVEMENT ACT OF 2016

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September 12, 2017

EPA National FOIA Training
Conference

OVERVIEW

Changes that result in greater disclosures

- The “Rule of 3”
- Codification of the Foreseeable Harm Standard
- 25-year Sunset on the Deliberative Process Privilege

Changes affecting processing of FOIA requests

- New Elements for Response Letters
- Extending Time Limits
- Charging Fees

Other changes

GREATER DISCLOSURES - THE “RULE OF THREE”

The “Rule of Three” states that any document requested three times must be publicly-available in electronic format.

- This is different from proactive disclosures (discussed next).

Recommended Action:

- ✓ Programs should make sure that all FOIA responses are properly uploaded to FOIAonline. Most records uploaded to FOIAonline are available to the public.

GREATER DISCLOSURES - PROACTIVE DISCLOSURES

The FOIA Improvement Act of 2016 amends Section 3102 of the Federal Records Act, 44 U.S.C. § 3102, to include a requirement that agencies establish “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.”

GREATER DISCLOSURES - FORESEEABLE HARM STANDARD CODIFIED

Foreseeable Harm Standard:

Agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”

Amendments codify the foreseeable harm standard set forth in Attorney General Eric Holder’s “Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51879 (Oct. 8, 2009).”

GREATER DISCLOSURES - DUTY TO SEGREGATE NONEXEMPT INFORMATION

Agencies must “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and “take reasonable steps necessary to segregate and release nonexempt information.”

- Although the FOIA already included language requiring agencies to segregate nonexempt information, the FOIA Improvement Act of 2016 adds additional language that appears in the 2009 Attorney General Memorandum regarding agencies’ obligation to segregate nonexempt information.

GREATER DISCLOSURES - NEW SUNSET PROVISION

25-year sunset on the Deliberative Process Privilege (DPP)

- DPP can no longer be applied to records created 25 years or more prior to the date of the FOIA request.
- The Sunset Provision does not affect withholdings under the Attorney-Client or Attorney Work Product privileges.

GREATER DISCLOSURES - RECOMMENDED ACTIONS

- ✓ Continue to apply the foreseeable harm standard, as we have previously done, consistent with the Holder memorandum.
- ✓ Do not withhold a document in full if it can be released in part.
- ✓ Do not withhold a document or portions of a document under the deliberative process privilege if it was created 25 years or more prior to the date of the FOIA request.

PROCESSING CHANGES - NEW ELEMENTS FOR RESPONSE LETTERS

Final Response Letters for adverse determinations:

- Right to seek assistance from FOIA Public Liaison;
- 90 days to appeal; and
- Right to seek dispute resolution services from FOIA Public Liaison or Office of Government Information Services (OGIS), part of the National Archives and Records Administration (NARA).

PROCESSING CHANGES - EXTENSIONS OF TIME

If you get the additional 10 working days but then determine that you cannot respond within that extended period, you must notify the requester that it has the right to seek dispute resolution services from OGIS.

- This notification must be issued in a “timely manner.” While “timely manner” is not defined in the Act, OGC recommends that offices send the letter during the 10 working day extended period.

PROCESSING CHANGES - RECOMMENDED ACTIONS

- ✓ Use the new appeal language available on the intranet (next slide).
- ✓ Continue to provide appeal language for all Final Response Letters, including full grants.
- ✓ If you anticipate that it will take you more than 30 calendar days to respond to a FOIA request (i.e., 20 days plus 10 days for unusual circumstances), make sure to notify requesters:
 - (1) that you need time beyond the 10-day extension period; and
 - (2) that they have a right to seek dispute resolution services from the OGIS.

FOR COPYING AND PASTING INTO LETTERS:

NEW APPEAL LANGUAGE FOR ALL FINAL FOIA RESPONSES, EXCEPT EXEMPTION 4:

This letter concludes our response to your request. You may appeal this response by email at hq.foia@epa.gov, or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 pm EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

APPEAL LANGUAGE IF THERE IS AN INITIAL WITHHOLDING BASED ON EXEMPTION 4:

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be reviewed by the appropriate legal office, which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information under Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response by email at hq.foia@epa.gov or by mail to the National Freedom of Information Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue. If you are submitting your appeal by hand delivery, courier service or overnight delivery you must address your correspondence to 1301 Constitution Avenue, N. W., Room 6416J, Washington, DC 20004. Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. Appeals received after 5:00 pm EST will be considered received the next business day. The Agency will not consider appeals received after the 90-calendar-day limit. The appeal letter should clearly identify the determination being appealed, including the assigned FOIA tracking number shown above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal." Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at hq.foia@epa.gov or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail to the Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; email, ogis@nara.gov; telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.



PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES

Agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of “unusual circumstances”), even with an agreement from the requester.

As a reminder, “unusual circumstances” apply when there is a need:

- to search for and collect records from field offices, or other establishments;
- to search for, collect, and examine a voluminous amount of records; or
- for consultations with another agency or with more than two components within the same agency.

PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES *EXCEPTION*

Agencies **may** still charge search fees (or duplication fees for “news media” or “educational” requesters) if:

- “unusual circumstances” apply, **and**
- “more than 5,000 pages are necessary to respond to the request,” **if**:
 - (1) timely written notice has been made to the requester, **and**
 - (2) “the agency has discussed with the requester how the requester could effectively limit the scope of the request.” The agency must make at least three good-faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.
- Note: “5,000 pages” refers to the number of pages in the total universe of documents required for review (i.e., “collected” documents), *not* the number of pages that will be ultimately released to the requester.

PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES - RECOMMENDED ACTIONS

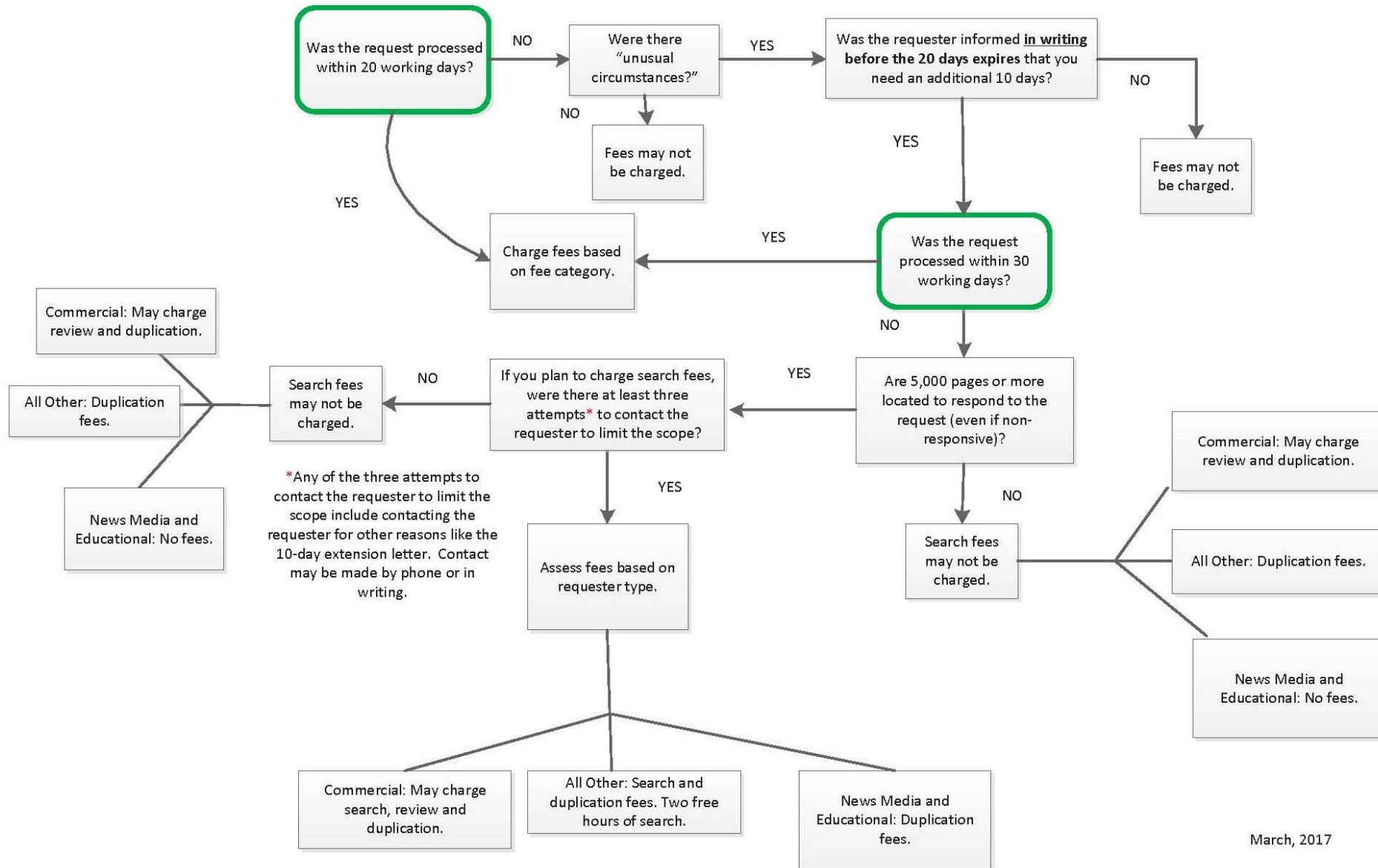
- ✓ If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester before the 10 days expires and discuss how it can limit the scope of the request.
- ✓ If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and include language inviting the requester to discuss how to limit the scope of the request.
 - This will satisfy the “timely notice” requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.

PROCESSING CHANGES - NEW LIMITATION ON SEARCH FEES - RECOMMENDED ACTIONS (CONT.)

- ✓ If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope.
 - This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first attempt went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact the requester before satisfying the requirement that the agency make three good-faith attempts.
 - If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make additional attempts.

FOIA Fees Decision Tree

Based on the FOIA Amendments of 2016



March, 2017



OTHER CHANGES

Chief FOIA Officers are now required to:

- “offer training to agency staff regarding their [FOIA] responsibilities,”
- “serve as the primary liaison with the Office of Government Information Services and the Office of Information Policy” which are part of NARA and DOJ, respectively.
- “review, not less frequently than annually, all aspects” of their agency’s FOIA administration.

New Chief FOIA Officer Council will serve as a forum for collaboration across agencies and with the requester community to explore innovative ways to improve FOIA administration.

- It shall “meet regularly and such meetings shall be open to the public” and at least annually the Council must have an open meeting that permits interested members of the public to appear and present statements.

Annual FOIA Report must include two new elements:

- The number of times “the agency denied a request for records under subsection (c)” of the FOIA, and
- The “number of records that were made available for public inspection in an electronic format under subsection (a)(2).”

The **Director of OMB**, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that:

- Allows the public to submit a request to any agency from a single website, and
- May include additional tools that OMB finds will improve FOIA.

RESOURCES

The FOIA Improvement Act of 2016

- <https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml>

DOJ Summary of the FOIA Improvement Act of 2016

- <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>

EPA FOIA Fees Decision Tree

- <http://intranet.epa.gov/foia/docs/Fee-decision-tree.pdf>

Model FOIA Appeal Language

- <http://intranet.epa.gov/foia/docs/FOIA-Appeal-language-March2017.docx>

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EPA FOIA REGULATIONS UPDATE

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September 12, 2017

EPA National FOIA Training
Conference

NEED FOR REVISION OF EPA'S FOIA REGULATIONS

Most recent update to the regulations occurred in 2002

2007 Open Government Act Amendments

2011 EPA FOIA Workgroup Report Recommendation

2016 FOIA Improvement Act Requirement

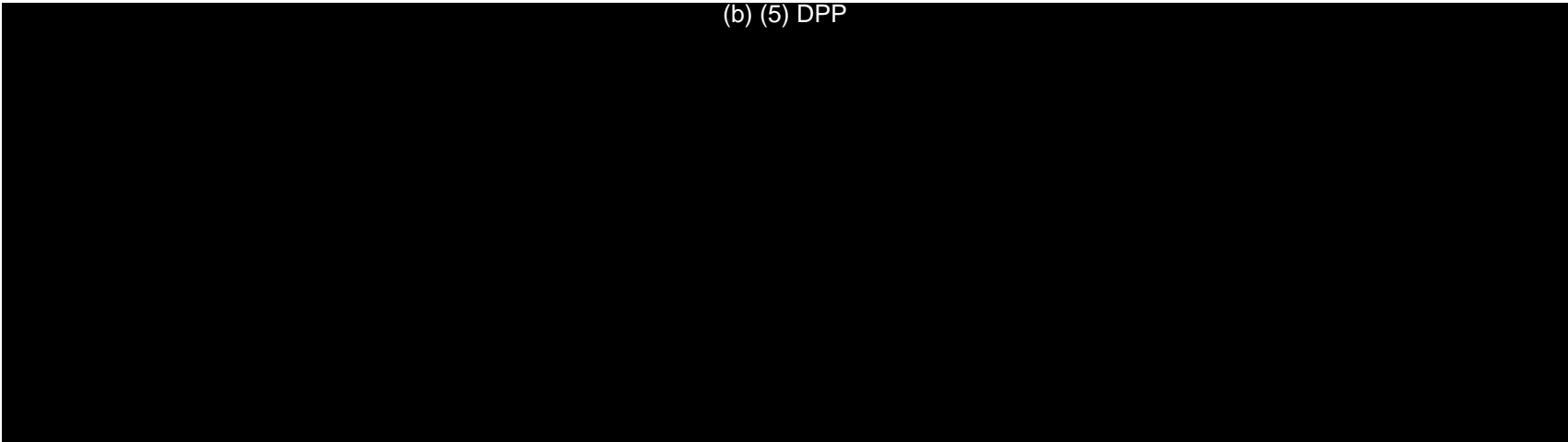
Impact of technology changes to FOIA processing

OVERVIEW OF POTENTIAL CHANGES

Organization

Revisions related to the 2007 and 2016 Amendments to FOIA

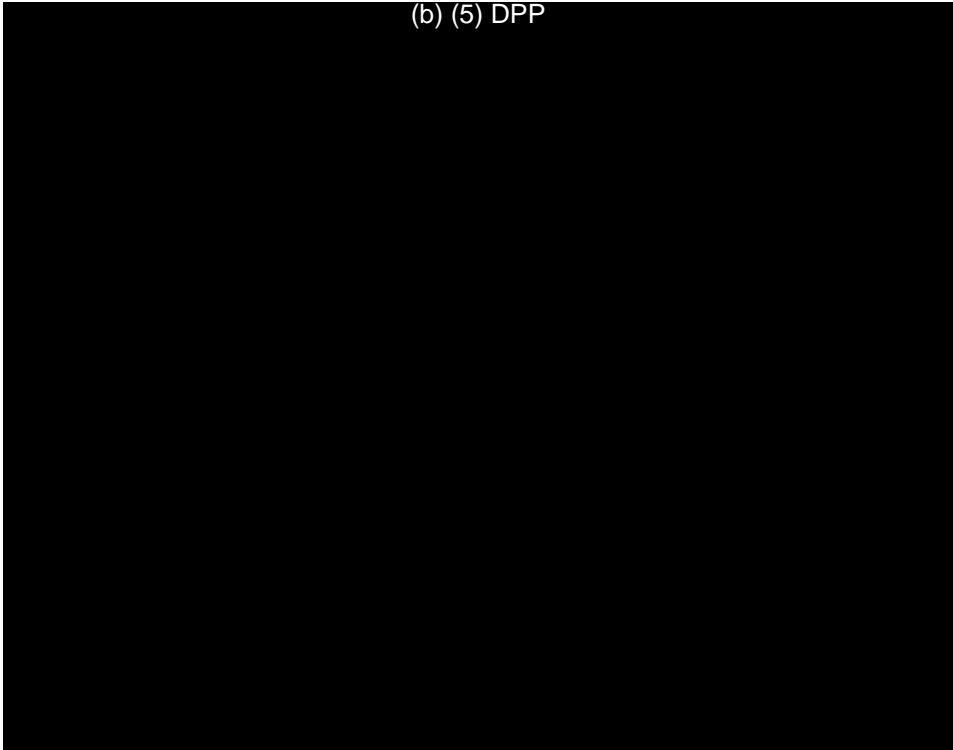
(b) (5) DPP



Other Changes

POTENTIAL ORGANIZATION

(b) (5) DPP



(b) (5) DPP



POTENTIAL UPDATES RELATING TO FOIA AMENDMENTS

Update definition of news media (2007)

Minimize “misdirected requests” delays (2007)

- Fewer offices designated in the regulations to receive FOIA requests and streamlined channels of submission to EPA

Updated tolling provisions (2007)

Establishment of the FOIA Public Liaison (2007)

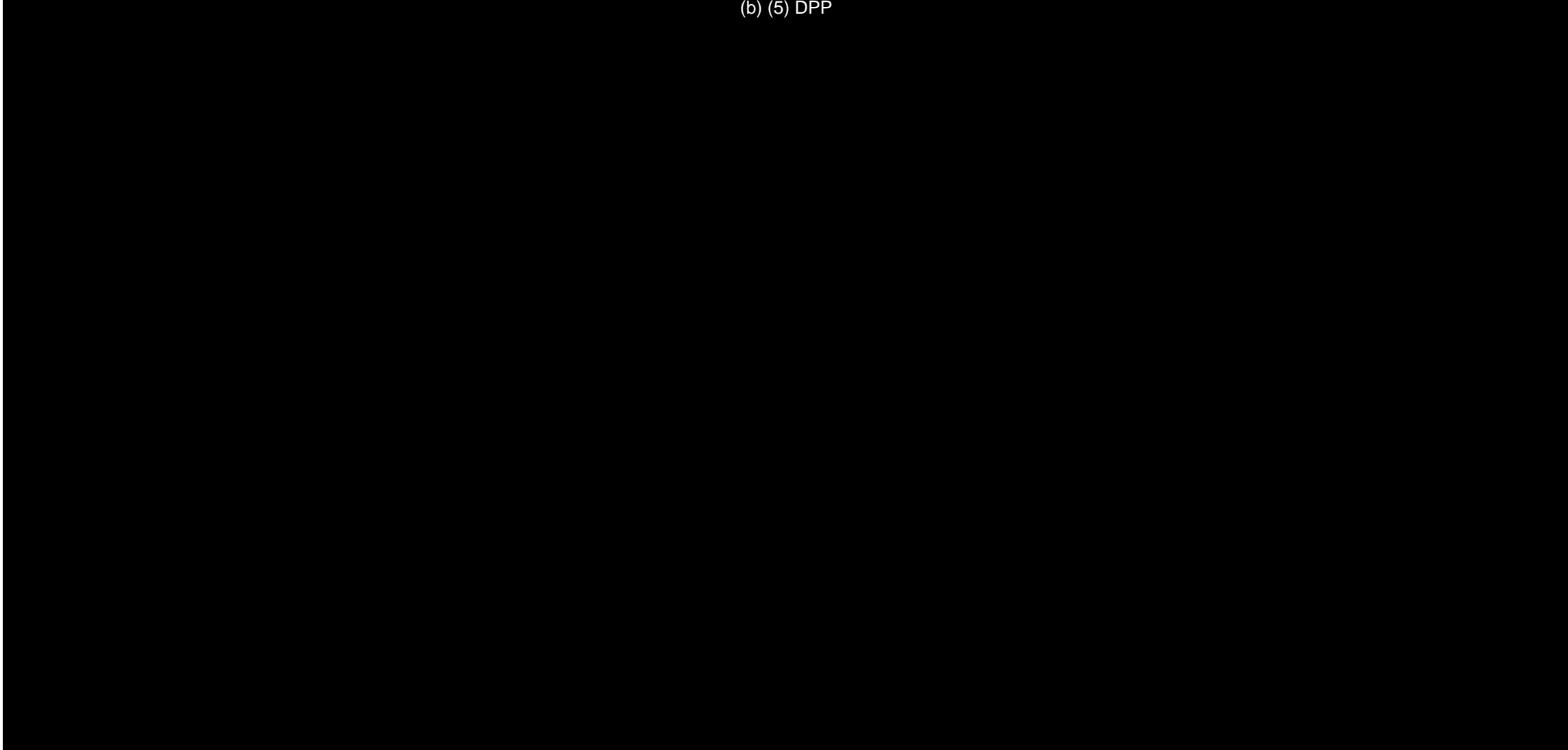
Search fees limitation (2016)

Final response requirements (2016)

Time for appeal (90 days) (2016)

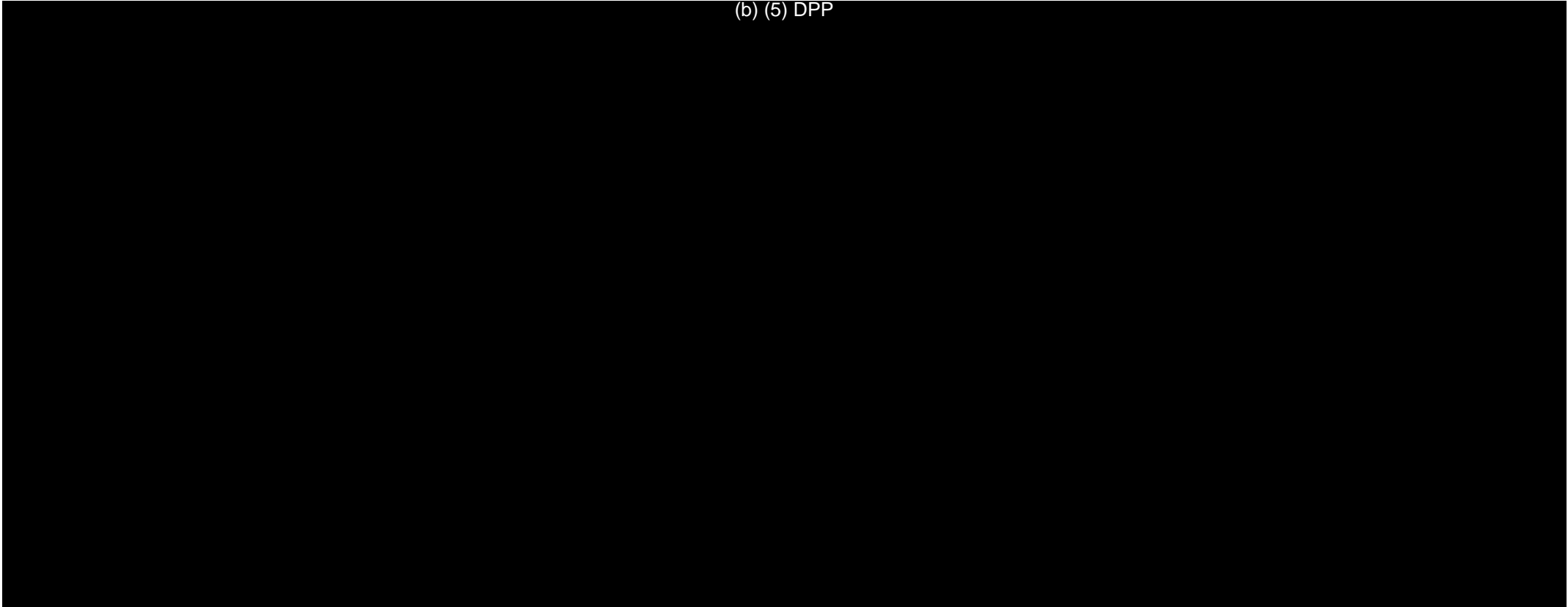
POTENTIAL PROCESS IMPROVEMENTS —

(b) (5) DPP



OTHER POTENTIAL PROCESS IMPROVEMENTS

(b) (5) DPP

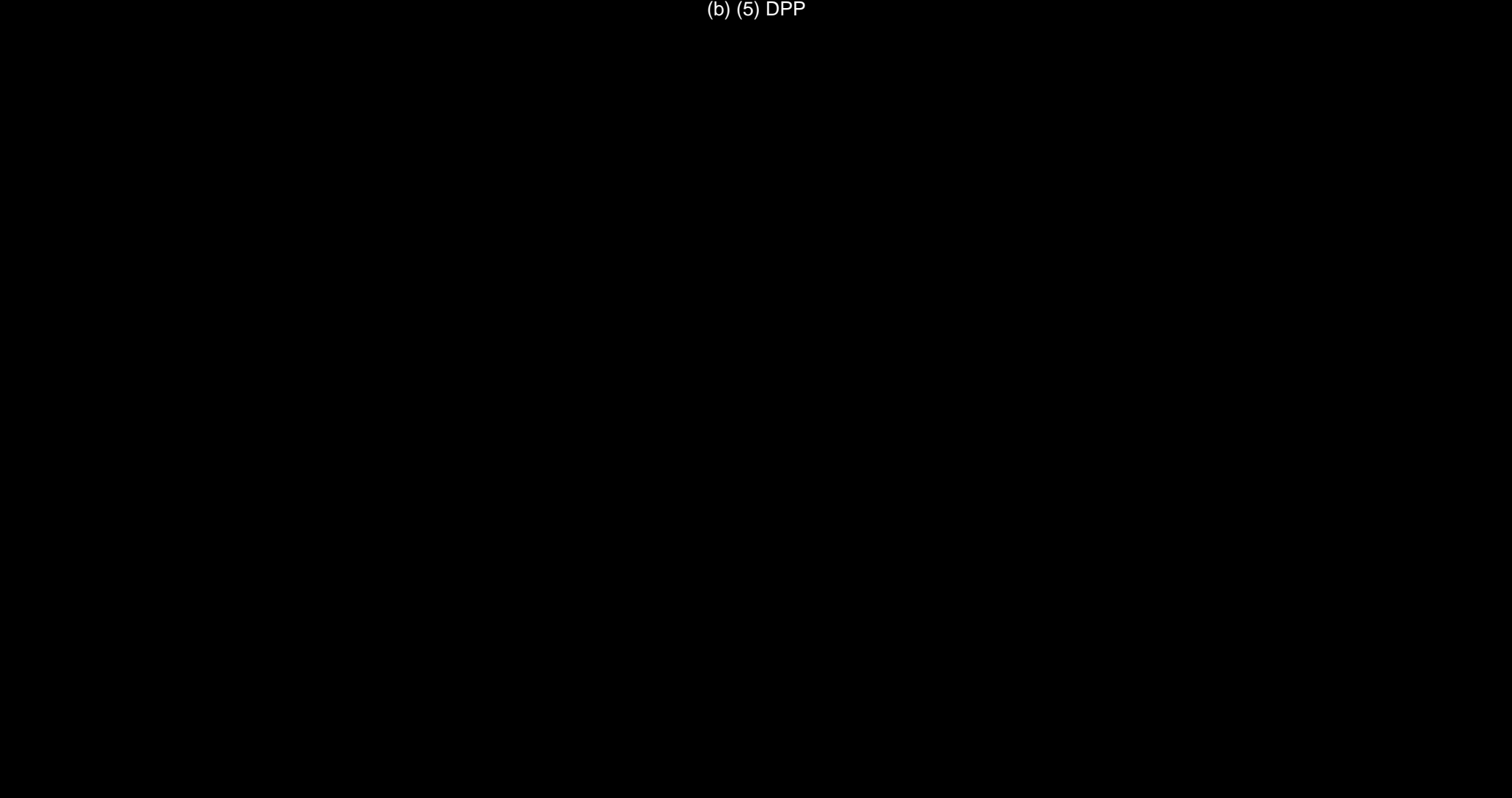


OTHER POTENTIAL PROCESS IMPROVEMENTS

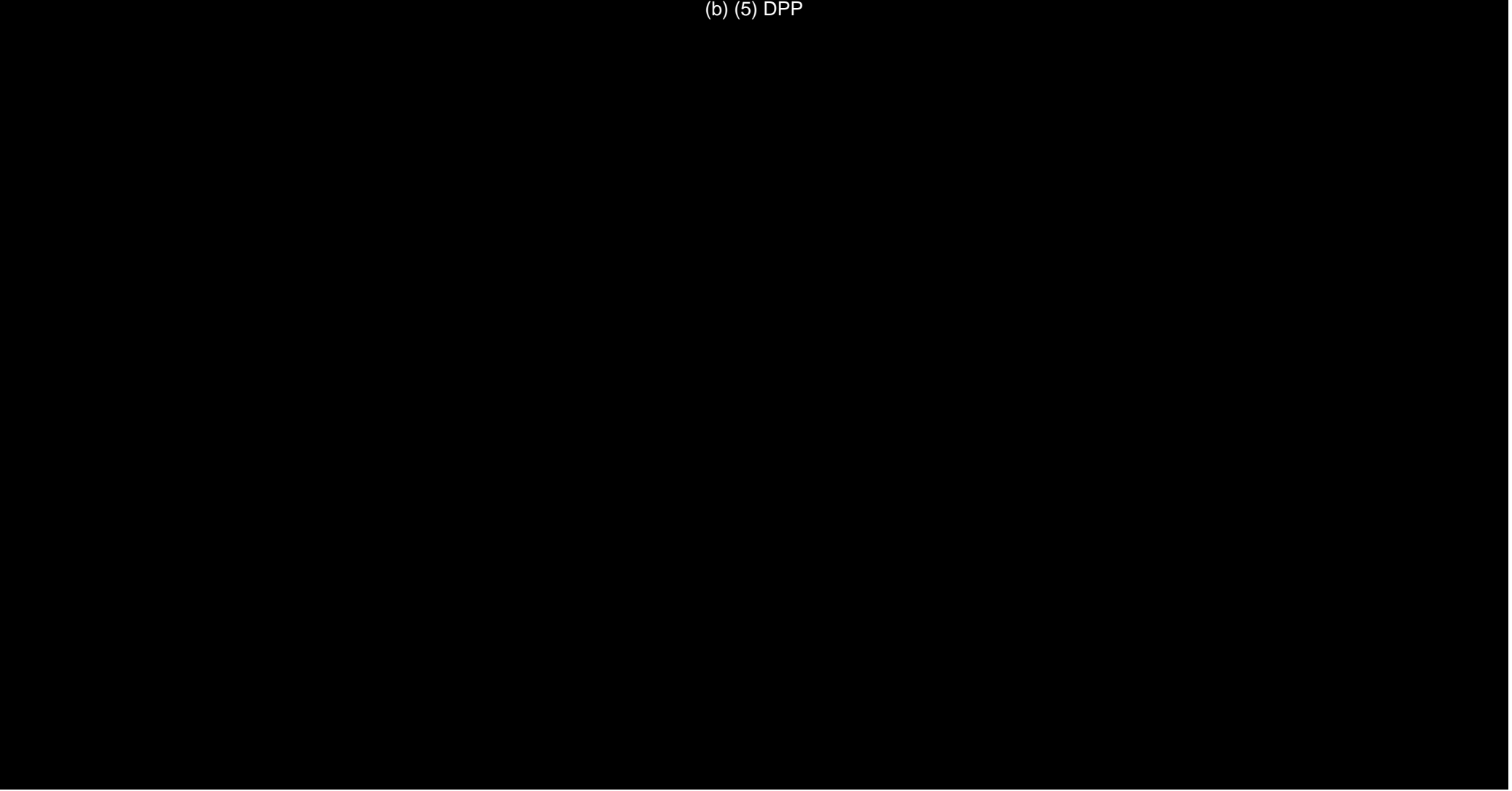
(b) (5) DPP



(b) (5) DPP




(b) (5) DPP



OTHER POTENTIAL CHANGES

(b) (5) DPP



Remove list of exemptions as duplicative of the statute

NEXT STEPS & ESTIMATED TIMELINE

(b)(5), Deliberative



(b)(5), Deliberative



(b)(5), Deliberative



For Questions on Status Contact: Larry Gottesman, Agency FOIA Officer at gottesman.larry@epa.gov

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FOIA Exemption 5

September 13, 2017

National FOIA Training Conference

Mike Boydston, R8 ORC
Jennifer Hammitt, OGC GLO

Remember:

FOIA mandates disclosure

Under the Freedom of Information Act (FOIA), the Government **must release** all records responsive to a FOIA request, unless the information is exempt from disclosure under one of the nine statutory exemptions.

Exemption 5 overview

- ▶ Protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”
- ▶ Incorporates civil discovery privileges into FOIA
 - Deliberative Process Privilege
 - Attorney-Client Privilege
 - Attorney Work Product Privilege

Exemption 5 Threshold Requirement

- ▶ “Inter-agency or intra-agency”: if this isn’t satisfied, you cannot assert Exemption 5.
- ▶ As interpreted, this is not strictly limited to records internal to executive branch agencies — depending on the facts, it **may** in limited circumstances also include agency communications with:
 - Outside experts and other consultants
 - States, tribes
 - Congress
 - Contractors
 - Federal Commissions
 - The White House

Exemption 5 Threshold Requirement: The Consultant Corollary

- ▶ *Klamath* case from Supreme Court.
- ▶ Agencies can protect advice from consultants and other outside experts functioning as an agency employee would be expected to do.
 - But the consultant must not be representing its own interest or some other outside interest in advising the agency.
 - Especially, the consultant cannot be seeking its own benefit at the expense of others (*Klamath*: “the distinction is even sharper” then).
- ▶ A consultant can be a volunteer.
- ▶ A formal consulting relationship is not necessary.
- ▶ Doesn’t flow both ways — covers advice to EPA, not advice from EPA.

Other threshold requirement issues

- ▶ Common Interest Doctrine
 - Joint Prosecution Agreements
- ▶ Co-regulator?
- ▶ Settlements?
- ▶ “Peer Review” and “Stakeholder Review”

Exemption 5 – Deliberative Process Privilege (DPP)

Once the inter/intra threshold requirement has been met, material **may** be covered by DPP, if and only if, it is:

(1) **Predecisional:** The information must relate to deliberations before the adoption of an agency policy/decision.

and

(2) **Deliberative:** It "reflects the give-and-take of the consultative process."

Note: it's not enough that material is "internal."

DPP element I: “Predecisional”

- DPP is not lost after the decision is made.
- But: created after the decision is made? **Not** predecisional
 - Final policy statements, opinions with force of law: these *are* the decisions, so are not predecisional
 - Documents that implement an established policy
 - Documents that explain or discuss actions already taken

DPP element 2: “Give and Take”

- What does it mean to “reflect give-and-take discussions”?
 - The decision does not have to be gigantic.
 - A decision does not even have to be reached.
 - But there has to be a decisionmaking process.
- Who drafted the information?
- What authority and level — did information flow from subordinate to superiors?
- Substantive vs. trivial decisionmaking
- Examples

DPP and Foreseeable Harm Analysis

➤ Now required by law (2016 FOIA amendments).

➤ Foreseeable harm analysis for DPP:

- Harm quality of agency decisions?
- Chilling effect on candid opinions / advice?
- Public confusion from premature disclosure?
- But: embarrassment ≠ harm

Deliberative Process Privilege: Applying the Privilege

Steps in considering DPP:

1. Inter/intra threshold
2. Exemption elements (predecisional & deliberative)
3. Foreseeable harm analysis
4. Redaction to release reasonably segregable information

Deliberative Process Rolling Sunset **(part of 2016 amendments):**

...the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested

Therefore, as of today, you cannot claim DPP for documents dating from before September 1992.

Attorney-Client Privilege

- ▶ You still have to meet the Exemption 5 threshold.
- ▶ Concerns “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” *Mead Data v. Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

Attorney-Client Privilege — issues and questions

- ▶ Confidential communications between agency attorneys can be covered, as can communications between attorneys and staff, that discuss legal issues or ask for legal advice.
 - Must be kept **confidential**/need to know
- ▶ A **cc to an Agency attorney isn't itself enough** (unless it's clear that purpose is to get/give attorney advice)!

Attorney Work Product

- ▶ The work product privilege protects material (1) prepared by, or at the direction of, an attorney (2) in reasonable anticipation of litigation.
- ▶ Extends to civil, criminal, and administrative litigation, as well as amicus briefs. *Env'tl. Prot. Servs. v. EPA*, 364 F. Supp.2d 575, 586 (N.D.W.Va. 2005) (EPA administrative enforcement proceeding).

Attorney Work Product — issues and questions

- ▶ “In anticipation of litigation” / interplay with litigation holds
- ▶ What kind of material does it cover? Does it have to be substantive?

Redaction

Redacting responsive records: FOIA requires EPA to segregate non-exempt (releasable) information from exempt (withholdable) information, if the releasable information can be reasonably segregated.

Different redaction approaches for:

- Deliberative Process Privilege
- Attorney-Client Privilege
- Attorney Work Product

Concerns with subject-matter and general waiver.

Other possible Exemption 5 privileges?

- ▶ Settlement – No! (Evidentiary rule ≠ Exemption 5 privilege)
- ▶ Doctor/patient, clergy, other privileges?
- ▶ What about judicial orders / protective orders?
- ▶ Look to other exemptions when Exemption 5 can't apply – 7A (enforcement), 6 (privacy), 4 (business info).

A few practice tips

- ▶ Easily filter some non-privileged material in reviews by searching for communications with outside parties.
- ▶ Spotting drafts in Relativity
- ▶ Front-end recommendations for composition and labeling
- ▶ Effect of email header/footer labels

Questions?

Resources / reference

- ▶ DOJ Guide: <http://www.justice.gov/oip/doj-guide-freedom-information-act-0>.
- ▶ DOJ FOIA resource page: <http://www.justice.gov/oip/foia-resources>.
- ▶ OGC Program Attorneys often know FOIA and can help on Exemption 5.
- ▶ ORC Information Law Attorneys (ask your ORC).
- ▶ OGC information law group: <http://intranet.epa.gov/ogc/information.htm>.